Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In re Applications of	)	
	)	
AMERITECH CORPORATION,	)	
Transferor,	)	
	)	
AND	)	
	)	CC Docket No. 98-141
SBC COMMUNICATIONS, INC.	)	
Transferee	)	
	)	
For Consent to Transfer Control of	)	
Corporations Holding Commission	)	
Licenses and Lines Pursuant to Sections	)	
214 and 310(d) of the Communications Act	)	
and Parts 5, 22, 24, 25, 63, 90, 95, and 101	)	
of the Commission's Rules	)	

REPLY COMMENTS OF SBC COMMUNICATIONS

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August 10, 2004

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I. INTRODUCTION AND SUMMARY

On June 9, 2004, SBC requested that the Commission discontinue requiring SBC to conduct audits of the SBC/Ameritech merger compliances for all periods beginning on or after January 1, 2004. SBC's request is limited in scope to audits of the handful of merger compliances that remain operative, and is based on a balancing of the costs and benefits of conducting such audits. Only AT&T submitted comments opposing SBC's request.[1] The bulk of AT&T's nearly twenty pages of comments, however, consists of procedural misdirection that has nothing to do with the merits of SBC's request. The Commission should not let AT&T divert its attention from consideration of the benefits and costs of continuing the merger audits for the few remaining operative merger compliances. That calculus demonstrates that

[1] Premier Network Services also opposed SBC's request. As sole support for its opposition, Premier attached a copy of a document entitled "SBC Audit Feasibility Analysis Report," which, as near as SBC can tell, has nothing to do with the SBC/Ameritech merger compliances or the merger compliance audit reports.

discontinuance of the merger compliance audits is in the public interest. Accordingly, SBC respectfully requests that the Commission grant its request.

II. AT&T'S DELEGATION OF AUTHORITY ARGUMENT HAS NO BEARING ON SBC'S REQUEST

AT&T's first argument against SBC's request is that the Enforcement Bureau lacks authority to grant the request. AT&T's argument is nothing more than a procedural red herring, and should have no bearing on the disposition of SBC's request. The Commission itself clearly has the power to "reconsider and revise its views as to the public interest and the means to protect that interest," including the imposition of merger compliances.[2] Indeed, SBC's letter was not even a necessary triggering event for the Commission to grant such relief. The Commission may grant on its own motion the relief sought by SBC.[3] Moreover, whether SBC appropriately *addressed* its letter to the Enforcement Bureau has no bearing whatsoever on the issue of whether or how the relief it requested may be granted. Whether the Commission itself considers the issue or it delegates that responsibility to one of its Bureaus is irrelevant to the question of whether the relief is appropriate.

The Commission, moreover, can clearly delegate responsibility for this matter to the Enforcement Bureau. On March 15, 2002, the Commission transferred delegated authority for "the audit function" of the *SBC/Ameritech Merger Order*[4] from the Common Carrier Bureau to the Enforcement Bureau.[5] Prior to that transfer, the Common Carrier Bureau clearly had authority under 47 C.F.R. §§ 0.91 and 0.291 to grant the relief requested by SBC.[6] Accordingly,

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[2] *MCI WorldCom Network Services, Inc. v FCC*, 274 F.3d 542, 548 (D.C. Cir. 2001).

[3] It is simply not true, as AT&T asserts, that "[t]he Commission made clear in the *SBC/Ameritech Merger Order* that it would not grant early termination of the any of the merger compliances." *AT&T Comments* at 5.

[4] Memorandum Opinion and Order, *Application of Ameritech Corp., Transferor, and SBC Communications Inc., Transferee, For Consent to Transfer Control*, 14 FCC Rcd 14712 (1999) ("SBC/Ameritech Merger Order").

[5] Delegation of Additional Authority to the Enforcement Bureau, *Order*, 17 FCC Rcd. 4795, FCC 02-76 ¶ 2 (March 15, 2002)("Transfer Order").

[6] The Common Carrier Bureau had general authority under § 0.91 to act under delegated authority "in all matters pertaining to the regulation and licensing of communications common carriers and ancillary operations." Moreover,

by virtue of the Commission's transfer of that authority, the Enforcement Bureau now has authority to grant such relief.[7] AT&T's argument that the Enforcement Bureau lacks authority to consider this matter is thus just as wrong as it is irrelevant.

III. CONDITION 17 SUNSET ON MARCH 24, 2003

AT&T is also flat-out wrong in its assertion—also irrelevant to SBC's request that the Commission discontinue merger audits—that Condition 17, which requires SBC to provide certain UNEs and combinations of UNEs, has not yet sunset. In fact, under its plain terms, that condition sunset on March 24, 2003, the date *USTA I*[8] became final and non-appealable.

As with most of the merger compliances, the beginning and end points of the duration of Condition 17 were triggered by the occurrence of future events rather than specific dates. Thus, the requirements of Condition 17 were to begin 10 business days after the merger closed. At the other end, Condition 17 also ceased to operate upon the occurrence of a specific, future triggering event.[9] In particular, in plain and simple terms, Merger compliance 17 specifies that it

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it specifically had authority to act "on requests for interpretation or waiver of rules," 47 C.F.R. § 0.91(b), and on "applications for service and facility authorizations." 47 C.F.R. § 0.91(d). The only substantial restriction on the Common Carrier Bureau's delegated authority was the restriction of 47 C.F.R. § 0.291(a)(2) that it "shall not have authority to act on any application or requests which present novel questions of fact, law or policy which can not be resolved under outstanding precedents and guidelines." SBC's request raises no such novel issues of fact, law, or policy and can easily be resolved by application of current Commission precedents and policy guidelines.

[7] AT&T suggests that the Commission's statement that its *Transfer Order* "in no way affects the substantive merger obligations," *Transfer Order* ¶ 2, means that the Enforcement Bureau "has no power on delegated authority to revisit these Commission public interest determinations." *AT&T Comments* at 6. That is a gross mis-reading of the Commission's statement. That statement clearly means that the *Transfer Order* itself did not alter the substantive obligations set forth in the merger compliances. It does not mean that the Commission stripped the Enforcement Bureau of any component of its authority with regard to the substance of the merger compliances.

[8] *USTA v. FCC*, 290 F.3d 415 (D.C. Cir. 2002), *cert. denied* 123 S.Ct. 1571 (2003) ("*USTA I*").

[9] AT&T suggests that because the *UNE Remand Order* was issued prior to the issuance of the *SBC/Ameritech Merger Order*, "it would have been a simple matter for the FCC (or SBC) to write the condition to specify that the obligation to offer UNEs would exist until the pending judicial review of the *UNE Remand Order* was final." *AT&T Comments* at 9. As an initial matter, AT&T is incorrect in its chronology. The *SBC/Ameritech Merger Order* was released on October 8, 1999, and, although the *UNE Remand* Order was adopted on September 15, 1999, it was not released until November 5, 1999. AT&T also either deliberately ignores or casually forgets the fact that, SBC submitted its proposed merger compliances to the Commission well before the *UNE Remand Order* had been adopted or released. *See, e.g., SBC/Ameritech Merger Order* ¶ 45 (SBC submitted its proposed conditions on July 1, 1999, and clarified the conditions on August 27, 1999, and in *ex parte* submissions in early September). Accordingly, it was necessary to identify the terminus of Condition 17's duration in the manner set forth in Condition 17, and it was not possible to simply describe Condition 17's sunset by reference to any pending judicial

"shall become null and void and impose no further obligation on SBC/Ameritech after the effective date of a final and non-appealable Commission order in the UNE remand proceeding."[10] The triggering event for this sunset provision occurred nearly a year and a half ago. The Commission issued its UNE Remand Order on November 5, 1999, and that order became final and non-appealable on March 24, 2003, when the D.C. Circuit's subsequent *USTA I* decision vacating the *UNE Remand Order* became final and non-appealable. By its own terms, therefore, Condition 17 sunset on March 24, 2003.

This conclusion is further supported by the additional provision in Condition 17 that it was to sunset on the "date of a final, non-appealable judicial decision providing that the UNE or combination of UNEs is not required to be provided by SBC/Ameritech."[12] As the Commission itself has held, the D.C. Circuit's decision in *USTA I* did precisely that—it eliminated the Commission's UNE rules at issue, and, in doing so, it provided that those UNEs were no longer required to be provided. Specifically, the Commission held in its *Triennial Review Order* that, upon the *USTA I* decision becoming "final and no longer subject to further review . . . the legal obligation [to provide UNEs] *will no longer exist*."[13] That determination – which no party challenged in the D.C. Circuit – is binding and confirms that Condition 17 is no longer in effect.[14]

AT&T nonetheless insists that the plain terms of Condition 17 mean something other than what they say. To achieve this linguistic feat, AT&T interleaves the actual words of

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review of the *UNE Remand Order*. There was no such pending review at the time Condition 17 was drafted and submitted to the Commission.

[10] *SBC/Ameritech Merger Order*, App. C ¶ 53.

[12] *SBC/Ameritech Merger Order* App. C, ¶ 53.

[13] *Triennial Review Order* ¶ 705 (emphasis added).

[14] In 2000, the Chief of the FCC's Common Carrier Bureau reached the same interpretation of an identical merger compliance in analogous circumstances, finding that a final and non-appealable court decision vacating and remanding the FCC's pricing rules would eliminate Verizon's obligation under that condition to offer UNEs at TELRIC prices. *See* Letter to Verizon from Dorothy T. Attwood, Chief, Common Carrier Bureau, FCC, 15 FCC Rcd 18327 (2000). It is SBC's understanding that the Enforcement Bureau has similarly determined that Merger compliance 17 sunset on March 24, 2003.

Condition 17 with a single phrase from the Commission's order approving the merger subject to the merger compliances. Through these gyrations, AT&T claims that the phrase "the UNE remand proceeding" in Condition 17 means not only the UNE remand proceeding but also "any subsequent proceeding." AT&T thus claims that Condition 17 continues to operate and will not sunset so long as the Commission continues to consider the scope of its unbundling rules. AT&T's position should be rejected out of hand.

As an initial matter, it is the terms of the merger compliances themselves that govern this issue, not the Commission's short-hand description of those conditions in its adopting order. The Commission made clear in the *SBC/Ameritech Merger Order* that "[t]he specific conditions that we adopt in the merger proceeding are set forth in Appendix C to this Order."[15] Accordingly, in the Ordering Clauses of the *SBC/Ameritech Merger Order*, the Commission made clear that the specific obligations it imposed on SBC are contained in Appendix C to the *SBC/Ameritech Merger Order*.[16] The Commission's general description in the narrative of its order is just that—a general description—and AT&T's substitution of that general language for the actual terms of the conditions adopted by the Commission is misplaced.

Moreover, even if it were necessary or appropriate to look to the narrative of the Commission's order in interpreting the scope of the merger compliances, the language in that narrative must be read in harmony with the actual language setting forth the merger compliances. With respect to Condition 17, that language is crystal clear: Condition 17 sunset upon the date of a final and non-appealable order in a single Commission proceeding—the UNE Remand Proceeding. Including additional proceedings other than the UNE Remand Proceeding in the duration of Condition 17, and thus protracting the timeline for triggering Condition 17's sunset, is fundamentally and plainly inconsistent with the language of Condition 17. Interpreting the triggering event for the sunset of Condition 17 to include any additional Commission

[15] *SBC/Ameritech Merger Order* ¶ 354 n. 663.

[16] *Id.* ¶ 584 ("IT IS FURTHER ORDERED that as a condition of this grant SBC and Ameritech shall comply with the conditions set forth in Appendix C of this Order.").

proceedings would thus violate common rules of construction because it would suggest that the Commission intended to include inconsistent provisions in the same document. Accordingly, AT&T's revisionist interpretation of Condition 17's sunset provision must be rejected.

AT&T's interpretation also must be rejected because it effectively nullifies the sunset provision in Condition 17. Under AT&T's interpretation, Condition 17 never sunsets so long as the Commission has an open proceeding to consider the scope of its unbundling rules. The Commission, however, remains free to revisit its unbundling rules and could even subject such rules to ongoing periodic review, precisely as it did in its *UNE Remand Order*, in which it established its triennial review process.[17] Thus, under AT&T's theory, Condition 17 would effectively never sunset. That simply can not be squared with the clear language of Condition 17 or with the "Commission's policy, as stated in the *SBC/Ameritech Merger Order,* to obligate SBC's compliance with the merger compliances for a finite period of time."[18] It also is inconsistent with the Commission's policy articulated in the *Triennial Review Order* that "it would be unreasonable and contrary to public policy to preserve our prior rules for months or even years pending any reconsideration or appeal of this order."[19] Both to remain consistent with rules of construction and faithful to Commission policy, Condition 17 must mean what it says: Condition 17 became null and void on the date its November 5, 1999, *UNE Remand Order* became final and non-appealable—March 24, 2003.

[17] *UNE Remand Order* ¶ 151.

[18] Letter from William Davenport, Chief, Investigations and Hearings Division, Enforcement Bureau, to Jim Lamoureux, Senior Counsel, SBC Communications, Inc., CC Docket No. 98-141 (April 26, 2004).

[19] *Triennial Review Order* ¶ 705.

IV. THE COSTS OF CONTINUED MERGER COMPLIANCE AUDITS OUTWEIGH THEIR BENEFITS

As its sole substantive response to SBC's request, AT&T essentially claims that the Commission, having initially included the audit requirement in its *SBC/Ameritech Merger Order*, should remain perpetually bound by that requirement, regardless of the benefits afforded by or costs incurred as a result of such audits. There is no merit to AT&T's claim.

The Commission did not hold, in the unqualified and absolute manner suggested by AT&T, that "the cost of an audit is a necessary cost of protecting the public interest."[20] Rather, the Commission made clear in the *SBC/Ameritech Merger Order* that the audit requirement was designed to provide an "efficient and cost effective" means of ensuring a "reasonable" assurance of compliance with the merger compliances. The Commission itself thus interposed balancing considerations in its adoption of the audit requirement. And it is precisely the balancing of such costs and benefits that justifies SBC's request that the Commission forego post-merger audits for all periods beginning on or after January 1, 2004.

There are undeniable costs—in time, resources, and money—incurred as a result of the merger compliance audits, and it is precisely because such costs outweigh the limited benefit of continued audits that SBC requested that the Commission discontinue such audits. AT&T never denies the essential truth that the merger compliance audits are costly. Instead, AT&T's only retort is a tangential *ad hominem* attack on SBC's estimate that the merger compliance audits for the years 2004 and beyond will cost at least $1 million. AT&T never suggests, however, that SBC's estimate is inaccurate, and disparaging SBC's estimate as "unsubstantiated" and "*ipse dixit,*" does not refute the fundamental fact that SBC—as well as the Commission—incurs substantial costs in conducting the merger compliance audits.

More fundamentally, none of AT&T's arguments demonstrates that the benefits of continuing the merger compliance audits beyond January 1, 2004, outweigh their costs. Notwithstanding AT&T's patently false argument that Condition 17 has not sunset, it is

[20] *AT&T Comments* at 17.

undisputed that only a handful of merger compliances remain in effect, and thus subject to audit, beyond January 1, 2004. And aside from isolated system errors which caused SBC to fail to properly apply Conditions 14 and 15, AT&T identifies no prior instances in which merger compliance audits revealed any issues of non-compliance with respect to any of the remaining merger compliances. More broadly, AT&T offers no hint of any past or future compliance issues for the remaining merger compliances which would justify the cost of continuing to audit SBC's compliance with those conditions.[21]

Those costs, moreover, need not be incurred in order to obtain reasonable assurance with the remaining operative merger compliances. Sufficient non-audit regulatory tools remain in place to ensure such compliance. First, SBC will continue to prepare and submit its merger compliance reports "in a format substantially similar, in relevant respects, to the format of the independent auditor's section of the audit report."[22] This report allows the Commission and others to confirm SBC's compliance with the merger compliances. And the Commission can always request additional information concerning or follow up on any aspect of SBC's merger compliance report. For the remaining operative merger compliances, the compliance report is a cost-effective means of ensuring compliance.[23]

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[21] AT&T complains about a loss of benchmarking as discussed by the Commission in the *SBC/Ameritech Merger Order*. *AT&T Comments* at 16-17. Nowhere in its discussion of benchmarks, however, does the Commission ever mention a connection between its bench marking concerns and the audit requirements. Indeed, the primary focus of the Commission with respect to benchmarks was the spread of "best practices" as a result of various merger compliances. *See, e.g., SBC/Ameritech Merger Order* ¶¶ 424-25. The only informational aspects of the Commission's benchmarking discussion concerned submissions such as Carrier-to-Carrier Performance Plan Reporting, ARMIS reporting, and service quality reports, *id.* ¶ 428, none of which have anything to do with the conduct of the merger compliance audits or would be eliminated if the Commission discontinues such audits.

[22] *SBC/Ameritech Merger Order*, App C, ¶ 66(f).

[23] AT&T suggests that the compliance reports are inadequate because "[t]here is no assurance that SBC would self-identify non-compliance where its interpretation differed from that of those harmed by its non-compliance." *AT&T Comments* at 15. AT&T, however, identifies only a single issue of interpretation that has occurred during past audits, and other than the bare assertion that "[s]imilar issues of interpretation could arise in the future," *id.* at 15, it offers no evidence that any such interpretation issues are likely as to any of the remaining operative merger compliances. More fundamentally, differences of interpretation do not automatically equate to non-compliance, and "those harmed" by any such differences of interpretation are certainly more likely than any paper trail audit to bring them to the Commission's attention for resolution.

Third parties are also sure to remain vigilant as to any merger compliance requirements from which they benefit. Regardless of the degree to which auditors may have "unique" access to internal SBC documents,[24] third party self-interest, combined with the threat of enforcement proceedings, is sure to remain a more effective means of ensuring compliance with the remaining merger compliances than paper trail auditing.[25] AT&T's suggestion. Moreover, that audits are necessary to ensure continued compliance because of the high cost of filing complaints relative to the value of the conditions is not only patently feeble but inherently self-contradictory. If the remaining audit conditions are of so little value, then surely the cost of conducting audits can not be justified; on the other hand, the greater the value of the remaining merger compliances, the more likely it is that the recipient of that value will initiate an enforcement proceeding in the event SBC fails to comply with any of those conditions. There simply is no justification for the burdens of continued audits for those few remaining operative merger compliances.

[24] *AT&T Comments* at 13.

[25] AT&T complains about the "futility" of filing complaints concerning merger compliance. *AT&T Comments* at 13-14. AT&T, however, refers only to two complaints filed with the Texas Public Utility Commission, which has no jurisdiction over the merger compliances in any event.

V. CONCLUSION

Amid its fusillade of irrelevant procedural arguments, AT&T offers no substantive reason for the Commission to continue to require compliance audits of the few remaining SBC/Ameritech merger compliances. Accordingly, for the reasons set forth in SBC's June 9, 2004, letter and in this Reply, SBC respectfully requests that the Commission discontinue SBC/Ameritech merger compliance audits for all periods beginning on or after January 1, 2004.

Respectfully Submitted,

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